STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2014
v STEVEN DEWAYAN OWENS, Defendant-Appellant.	No. 307090 Saginaw Circuit Court LC No. 10-033977-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RONALD EDWARD OWENS, JR., Defendant-Appellant.	No. 307117 Saginaw Circuit Court LC No. 10-033976-FC

Before: BECKERING, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

In docket no. 307090, defendant, Steven Dewayan Owens (Steven), appeals as of right his jury trial convictions of conspiracy to assault with intent to do great bodily harm less than murder, MCL 750.84, solicitation to assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to do great bodily harm less than murder, MCL 750.84, bribing, intimidating, or interfering with a witness in a criminal case, MCL 750.122(7)(b), and inciting or procuring one to commit perjury, MCL 750.425. Steven was sentenced as a third-offense habitual offender, MCL 769.11, to 114 months to 20 years for conspiracy to assault with intent to do great bodily harm less than murder, 57 months to 10 years for solicitation to assault with intent to do great bodily harm less than murder, 114 months to 20 years for assault with intent to do great bodily harm less than murder, 114 months to 20 years for bribing, intimidating, or interfering with a witness in a criminal case, and 57 months to 10 years for inciting or procuring one to commit perjury. Count 4—bribing, intimidating, or interfering with a witness in a criminal case—was the only count to run consecutive to the others.

In docket no. 307117, defendant, Ronald Edward Owens, Jr. (Ronald), appeals as of right his jury trial convictions of conspiracy to assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to do great bodily harm less than murder, MCL 750.84, bribing, intimidating, or interfering with a witness in a criminal case, MCL 750.122(7)(b), and inciting or procuring one to commit perjury, MCL 750.425. Ronald was sentenced as a second-offense habitual offender, MCL 769.10, to 83 months to 15 years for conspiracy to assault with intent to do great bodily harm less than murder, 5 to 15 years for assault with intent to do great bodily harm less than murder, 83 months to 15 years for bribing, intimidating, or interfering with a witness in a criminal case, and 5 years to 90 months for inciting or procuring one to commit perjury. Count 4—bribing, intimidating, or interfering with a witness in a criminal case—was the only count to run consecutive to the others.

These appeals were consolidated to advance the efficient administration of the appellate practice. We affirm in both dockets.

I. FACTUAL BACKGROUND

Cornelius Owens (Cornelius)[1] was shot twice in the legs on April 24, 2009. Cornelius and another witness—Maurice Harris—identified the shooter as Dyterius Roby, although Cornelius believed defendants were behind the shooting. The prosecution presented evidence that in February 2009, a drug raid occurred at Ronald's residence, and the police confiscated drug residue and paraphernalia, and approximately $60,000 hidden in air vents throughout the home. At a subsequent drug raid at Ronald's residence in November, the police found a substantial amount of crack cocaine, $2,100 hidden in the walls, and drug packaging material.

Cornelius, a member of the same gang as defendants, participated in a DVD called "Prison Talk" in which he referenced certain gang affiliations and spoke negatively about the defendants. After the February drug raid and the DVD, Cornelius began to hear rumors that defendants thought he was the snitch that led to the raid. Cornelius claimed that Steven called him a snitch and Ronald yelled out "don't speak to the wire," which again was a reference to Cornelius being a "snitch," "rat" or the "police." About a week before the shooting, Cornelius confronted the defendants at a fish fry. Cornelius and other men pointed guns at the defendants, but the confrontation deescalated with no shots fired.

After Cornelius was shot, he eventually identified Roby as the shooter. Yet, Cornelius testified that both Ronald and Steven approached him and offered him money and cocaine to recant his identification. Cornelius met with Roby's attorney and did as defendants asked, but after speaking with the police again, Cornelius admitted to the perjury scheme. A taped telephone call with Steven was admitted at trial, in which Steven discussed the scheme with Cornelius.

Steven was convicted of conspiracy to assault with intent to do great bodily harm less than murder, solicitation to assault with intent to do great bodily harm less than murder, assault

[1] Cornelius is not related to the defendants.

with intent to do great bodily harm less than murder, bribing, intimidating, or interfering with a witness in a criminal case, and inciting or procuring one to commit perjury. Ronald was convicted of conspiracy to assault with intent to do great bodily harm less than murder, assault with intent to do great bodily harm less than murder, bribing, intimidating, or interfering with a witness in a criminal case, and inciting or procuring one to commit perjury. Both defendants now raise several issues on appeal.

II. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

Both defendants raise numerous challenges to the admission of evidence. We review evidentiary issues for an abuse of discretion. *People v Benton*, 294 Mich App 191, 199; 817 NW2d 599 (2011). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "Evidentiary error does not require reversal unless after an examination of the entire cause, it appears more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence." *Benton*, 294 Mich App at 199; MCL 769.26. However, to the extent that admission of evidence involves a "preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence" then review of that issue is de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Moreover, "it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id.*

"We review the decision whether to appoint an expert for an abuse of discretion." *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). We also review for an abuse of discretion "a trial court's decision on an expert['s] qualifications." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009).

B. OTHER ACTS EVIDENCE

Both defendants raise numerous challenges to admissibility of evidence regarding gang and drug involvement. However, the disputed evidence was admissible as relevant *res gestae* evidence.

The *res gestae* doctrine provides that a jury is entitled to hear the complete story of the crime. *People v Aldrich*, 246 Mich App 101, 115; 631 NW2d 67 (2001); see also *People v Bostic*, 110 Mich App 747, 749; 313 NW2d 98 (1981) ("The res gestae has been referred to as the 'complete story.'"). "Res gestae are circumstances, facts and declarations which so illustrate and characterize the principal fact as to place it in its proper effect." *Bostic*, 110 Mich App at 749. This concept relies on the principle that background information is often necessary to provide the jury the proper context in which to evaluate the evidence. *People v Malone*, 287 Mich App 648, 661; 792 NW2d 7 (2010). In other words, the more the jurors know about the full transaction, the better equipped they are to uphold their sworn duty. *Id.* (quotation marks and citation omitted). As this Court has explained:

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent

> event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the 'complete story' ordinarily supports the admission of such evidence. [*Id.* (quotation marks and citation omitted); see also *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996).]

Thus, "[e]vidence of other criminal acts is admissible when it explains the circumstances of the crime." *Malone*, 287 Mich App at 662.

In the instant case, there was a drug raid at Ronald's house in February 2009, where the police confiscated drug residue and $60,000. In a subsequent raid, the police discovered additional money and crack cocaine. Cornelius and the defendants had been a part of the same gang, the Geto Doggs Gang, but after the February raid and the Prison Talk DVD, their relationship changed. Cornelius began to hear rumors that he was the snitch that led to the February raid at Ronald's house. Cornelius claimed that Steven confronted him and called him a snitch, and that Ronald yelled out "don't speak to the wire," which was a reference to Cornelius being a "snitch," "rat" or the "police."

About a week after this incident, Cornelius was shot. Both Maurice and Cornelius identified Dyterius Roby as the shooter. An expert in the field of forensic cellular analysis testified that at the time of the shooting, Roby's phone was around that location. The expert further explained that Roby initiated direct connect contact with Steven several times that day, both before and after the shooting. After Roby was arrested, Ronald repeatedly deposited money into Roby's prison account.

As seen from the recitation of the evidence, the jury was called upon to decipher what occurred during private conversations between defendants and Roby, and the resulting decision to act. See *Sholl*, 453 Mich at 742 ("In this case, a jury was called upon to decide what happened during a private event between two persons."). Without understanding the context—that defendants were part of the same gang as Cornelius and perceived him to be the snitch that led to the exposure of their drug business and the loss of over $60,000—the jury would have been left without the complete story. *Aldrich*, 246 Mich App at 115. "It would have been perplexing to the jury" to know that Roby—with whom Cornelius had a good relationship—shot him without any apparent provocation. *Id.* The fact that defendants were in the same gang as Cornelius illuminated their relationship, and helped to explain why they reacted so strongly after thinking he was the snitch. Further, their belief that Cornelius exposed their drug business and cost them $60,000 "explains the circumstances of the crime." *Malone*, 287 Mich App at 662; *Bostic*, 110 Mich App at 749.

While Steven suggests that these events were too remote in time, "[t]here is no limit of time within which the res gestae can be arbitrarily confined." *People v McGraw*, 484 Mich 120, 150; 771 NW2d 655 (2009) (quotation marks and citation omitted).[2]

Alternatively, this evidence was relevant and admissible under MRE 404(b). As this Court succinctly explained:

> Generally, all relevant evidence is admissible, and irrelevant evidence is not. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." [*Benton*, 294 Mich App at 199-200 (quotation marks and citation omitted).]

Under MRE 404(b), inadmissible character evidence can be deemed relevant and admissible if it is offered for a purpose other than propensity. MRE 404(b)(1) provides: "Evidence of other crimes, wrongs, or acts" may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), the Michigan Supreme Court set forth the proper framework in which to analyze MRE 404(b) evidence: (1) the evidence must be offered for a proper purpose under MRE 404(b); (2) the evidence is relevant under MRE 401 and 402; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, as required under MRE 403. See also *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007).

Here, this evidence was admissible for the non-character purposes of motive. The prosecutor sought to prove the motive for the shooting stemmed from defendants' belief that their fellow gang member had snitched on them, which resulted in exposure and a police drug raid that cost them $60,000. Thus, evidence of their lucrative drug business and the gang relationship between the victim and defendants provided the factual context to understand an otherwise inexplicable act, which helped to establish motive.[3]

Furthermore, this evidence was relevant under MRE 401 and 402. As noted above, relevant evidence is any evidence that has a tendency to make the existence of a fact of

---

[2] We note that Cornelius gave conflicting testimony regarding whether the shooting was related to drugs or gangs.

[3] Unlike the defendant *People v Wells*, 102 Mich App 122, 129; 302 NW2d 196 (1980), in this case there was evidence that the defendants were part of the relevant gang.

consequence more or less probable than it would be without the evidence. *Benton*, 294 Mich App at 199-200. Evidence that defendants believed their fellow gang member had snitched on them and crippled their drug business makes it more probable that defendants were guilty of the charged offenses. Moreover, MRE 403 did not preclude the admission of such evidence. While this evidence was prejudicial, "[a]ll relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005) (citation omitted). As noted above, this evidence had significant probative value as it illuminated the motive behind the crimes and the identity of the perpetrators. Furthermore, the evidence of gang membership and drug dealing was relatively restrained, as no evidence was admitted regarding drug buys or irrelevant gang-related behavior. Thus, unfair prejudice did not result.[4]

Therefore, this evidence was admissible as *res gestae* and pursuant to MRE 404(b). Furthermore, "the trial court's decision on a close evidentiary question . . . ordinarily cannot be an abuse of discretion." *People v Sabin*, 463 Mich 43, 67; 614 NW2d 888 (2000). Defendants are not entitled to relief.[5]

C. EXPERT LINGUISTIC WITNESS

Steven also posits that the trial court abused its discretion in refusing to grant him funds for an expert linguistic witness. "Under the Due Process Clause, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such rights." *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). While a trial court may appoint an expert witness for the defense, "a trial court is not compelled to provide funds for the appointment of an expert on demand." *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003); MCL 775.15. It is a decision that lies within the discretion of the court, and "a defendant

[4] We also note that courts in other jurisdictions have held that such testimony can be helpful to jurors. See *People v Memory*, 182 Cal App 4th 835, 858 (2010) (evidence of gang membership is admissible to prove motive); *United States v Lemon*, 239 F3d 968, 971 (CA 8, 2001) ("Evidence of gang membership is admissible if relevant to a disputed issue."); *United States v Irvin*, 87 F3d 860, 864 (CA 7, 1996) ("We have consistently held that, under appropriate circumstances, gang evidence has probative value warranting its admission over claims of prejudice.").

[5] While Steven challenges that the testifying officers should not have been qualified as experts under MRE 702, the substance of his argument merely is that this evidence was irrelevant and inadmissible, MRE 401, 402, 403. Ronald also raises other instances of perceived inadmissible evidence, such as testimony about Melinda Glenn. However, as the prosecutor argued, such evidence was offered merely to rebut the defendants' suggestion that the officer was biased. Also, testimony regarding "Flyrone" or the Burt Street Gang was admitted for the purpose of explaining who and what Steven and Cornelius were referencing in their taped phone conversation and the Prison Talk DVD. Further, any error in the admission of such evidence was harmless beyond a reasonable doubt MCR 2.613.

must show a nexus between the facts of the case and the need for an expert." *Leonard*, 224 Mich App at 582. Moreover, it is "not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness." *Id.* (citations omitted); *Tanner*, 469 Mich at 443.

The trial court did not abuse its discretion in denying Steven an appointed expert linguistic witness. Steven argues that he was in need of an expert linguistic witness to interpret the taped conversation between himself and Cornelius regarding the perjury scheme. However, Steven merely speculates that an expert witness would have offered favorable testimony regarding the interpretation of the conversation. See *Tanner*, 469 Mich at 443 ("[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert."). Thus, he has not established that he was deprived of a substantial defense. Moreover, as the prosecution argued at the hearing, the relevance of this conversation was deciphering what Steven and Cornelius were communicating to each other. What a third-party may understand the conversation to mean is not relevant. Rather, the relevant inquiry was what Steven and Cornelius understood the conversation to mean. An expert linguistic could not help the jury in understanding that relevant inquiry. MRE 702; *People v Ackerman*, 257 Mich App 434, 444; 669 NW2d 818 (2003) (expert testimony must be "relevant and helpful to the trier of fact[.]").

Because the trial court's ruling was not outside the range of reasonable and principled outcomes, the requested relief is not warranted.

D. WITNESS INTIMIDATION

Steven also contends that evidence that Maurice was threatened was improperly admitted at trial.[6] However, Steven has mischaracterized the testimony below.[7] On appeal, Steven states that "Harris later stated that his decision to speak to the police and to testify was influenced by a comment [Steven] made to him in the jail and his belief that Appellant was a member of the Geto Doggs gang." However, when asked why he changed his mind and decided to cooperate, Maurice did not reference gangs, but instead explained that he heard a rumor in jail that he was going to be hurt. In fact, Maurice testified that he did not know from whom the threat was coming, although he perceived it was coming from Steven. Yet, it was only after Maurice met with the police that he ran into Steven, who repeatedly asked if Maurice was snitching. While Maurice was asked about the defendants' membership in the Geto Doggs Gang, at no time did he indicate that any gang affiliation influenced his decision to testify.

---

[6] While Steven claims this issue is preserved, he only objected at trial based on the gang references, not to whether Maurice could testify regarding general threats. Thus, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[7] To the extent that this issue may implicate other evidence not cited in his discussion section, Steven has abandoned such claims. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).

Thus, defendant's argument on appeal is severely undermined by his distortion of the evidence below. Furthermore, as this Court has recognized: "All relevant evidence will be damaging to some extent. The fact that evidence is prejudicial does not make its admission unfair. Unfair prejudice exists only where either a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, or it would be inequitable to allow the proponent of the evidence to use it." *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009).

Other than merely characterizing this as "unfair evidence" that he perceived as "prejudicial," Steven has failed to engage in a meaningful analysis of why this evidence should have been excluded. Because he also failed to object below, the record is devoid of his reasoning or arguments. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (an appellant may not simply "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.").

Thus, Steven has not demonstrated a basis for excluding this portion of Maurice's testimony.

E. RECORDED OUT-OF-COURT STATEMENT

Steven also challenges the admission of Maurice's taped interview with the police. "The admission of a prior consistent statement through a third party is appropriate if the requirements of MRE 801(d)(1)(B) are satisfied." *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). In order for such a statement to be admitted, the following four-part test is used: "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." *Id.* at 707 (quotation marks and citation omitted).

On appeal, Steven only challenges the fourth element. He argues that the prior consistent statement was not made before the time the supposed motive to falsify arose. *Jones*, 240 Mich App at 706. Thus, the crux of this issue is when Maurice's alleged motive to lie arose. As the trial court found, any alleged motive to lie did not arise until Maurice talked to his attorney or the prosecutor in an attempt to get the charges against him dropped or diminished. The statement Maurice made to the police occurred before any alleged deal was offered. Thus, Steven has not demonstrated that the trial court erred in admitting this evidence under MRE 801(d)(1)(B).[8]

[8] Furthermore, as the Michigan Supreme Court has proclaimed, a "trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

F. CELLULAR PHONE TOWER EXPERT TESTIMONY

Both defendants also contend that the trial court erred in permitting evidence from an expert in forensic cellular phone analysis regarding the location of Steven's and Roby's cellular phones at the time of the shooting. This argument is meritless.

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004), the Michigan Supreme Court adopted the requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 SCT 2786; 125 LEd2d 469 (1993), regarding the reliability of expert testimony. Thereafter, MRE 702 was amended to provide:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, the underpinning of MRE 702 is that the "trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable." *Steele*, 283 Mich App at 481. "When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its rate of error if known." *People v Kowalski*, 492 Mich 106, 131; 821 NW2d 14 (2012). Reviewing courts should be mindful that "the trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008) (quotation marks and citation omitted). Rather, the inquiry is whether the expert opinion is rationally derived from a sound foundation, not whether it is ultimately correct or universally accepted. *Id.*

In the instant case, the expert testified regarding his qualifications and training as follows:

> Starting back in early 2006, I took a course through the Public Administrative Training Council, which is law enforcement training council. That first class was a week-long class on forensic analysis of cellular data, basically obtaining cellular data from cellular phone companies, knowing how to get into cell phones and obtaining data from there, looking at the data that cellular phone companies would give to me, and be able to dissect those looking at how calls were made, where they were made from, the breakdown of cellular towers throughout the United States, how calls are placed and how they will hit a certain tower so you can track a person as well as doing live tracks on people as they have their cell phone in their possession.

The expert explained that he has testified as an expert in the area before in the district and circuit courts of Saginaw, and had even testified at the trial of Dyterius Roby. During the defense's voir dire, the expert testified that he took "continuing education classes specifically

related to the analysis of cellular data." When asked what further training he had, he explained that he took a two week course through Delta College, titled "crimes against computers," and several days included a discussion of the analysis of cellular data. When asked if he was certified, he confirmed that there was a certification given at the end of the Public Agency Training Council (PATC) course. He also had "hands-on field training." The expert explained that PATC was the only training facility that "touches on a full course in the analysis of cellular data." He was not aware of any scientific tests regarding the rate of error regarding cellular phone analysis. When asked whether he worked with cellular phone companies in order to locate individuals by pinning that individual's phone, he replied that he had done that at least 40 or 50 times.

Thus, the expert completed the training available and attained certification in the area of cellular forensic analysis. He also worked on several cases, and was repeatedly called to testify as an expert in the field. His knowledge went beyond that of an ordinary individual, and was based on sufficient facts and data. MRE 702. After a review of the cellular data relevant in the instant case, the expert was able to provide the jury with specific times and duration of calls made between the phones of Roby and Steven. Therefore, there was sufficient testimony for the trial court to conclude that the officer had the training and experience to provide the jury with useful, scientific, or specialized knowledge. The trial court did not abuse its discretion in qualifying the officer as an expert.

Ronald, however, posits that the expert was drawing conclusions from only one cellular tower, which lacked accuracy. Yet, that is a challenge to the weight of the evidence, not the admissibility. *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008). Further, while Ronald suggests that the expert was biased because he worked with the police department, we have repeatedly upheld police officers or government employees testifying as expert witnesses. See, e.g., *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008) ("A police witness can be qualified as an expert on the basis of experience or training in child sexual abuse cases.").

The trial court did not abuse its discretion in permitting the expert testimony in the field of cellular forensic analysis.

III. DISQUALIFICATION OF PROSECUTOR'S OFFICE

A. STANDARD OF REVIEW

Next, Ronald posits that the trial court erred in denying the motions to disqualify the Saginaw Prosecutor's Office. "[T]he determination whether a conflict of interest exists sufficient to require disqualification of the prosecuting attorney is a question of fact that is reviewed on appeal for clear error. Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004) (quotation marks and citation omitted).

B. ANALYSIS

There are two common grounds that warrant disqualifying a prosecutor. First are situations where there is "a conflict of interest arising out of some professional, attorney-client relationship, as when the defendant is a former client of the prosecuting attorney." *People v*

Doyle, 159 Mich App 632, 641; 406 NW2d 893 (1987). The second category involves "situations where the prosecuting attorney has a personal interest (financial or emotional) in the litigation, or has some personal relationship (kinship, friendship or animosity) with the accused." *Id.* at 641-642. Oftentimes, disqualification of the prosecutor under such circumstances is necessary to avoid even the appearance of impropriety. *Id.* at 642. If a court determines that the prosecutor must be disqualified, "the question then arises whether the entire prosecutor's office must be disqualified." *People v Mayhew*, 236 Mich App 112, 126-127; 600 NW2d 370 (1999). Factors like whether the prosecuting attorney has supervisory authority over other attorneys in the office, or has policy-making authority, make it more probable that recusal of the entire office is likely. *Id.* MCL 49.160 provides that a prosecutor's office may be disqualified and a special prosecutor appointed if there is a "conflict of interest or [the prosecutor] is otherwise unable to attend to the duties of the office."

In the instant case, defendants levy serious allegations against prosecutor Paul Fehrman and Judge William Crane. The factual circumstances center on Judge Crane's secretary, Fehrman's wife, and the allegations that Fehrman was having ex parte communications with the Judge. Yet, Judge Crane retired. He was not the presiding judge for trial nor for the motion to disqualify the prosecutor's officer. As Ronald's counsel conceded at the December 13, 2010 hearing, and on appeal, the issue of recusing Judge Crane is "moot." While there may have been a conflict of interest or an appearance of impropriety between Fehrman and Judge Crane, it was based on a personal relationship that became irrelevant once Judge Crane retired.

Moreover, the prosecution denied that any improper ex parte communications occurred, and the trial court was free to find such disavowals credible. The prosecutor had no prior or existing relationship with the defendants, was not privy to any confidential information, nor did he have a personal, financial, or emotional stake in the proceedings. Also, as the trial court found, reassignment of the case to the Honorable Fred L. Borchard cured any potential conflict of interest.

Therefore, the trial court properly denied defendants' motion to disqualify the entire prosecutor's office.[9]

IV. DIRECTED VERDICT & GREAT WEIGHT OF THE EVIDENCE

A. PRESERVATION & STANDARD OF REVIEW

Ronald next contends that the trial court erred in denying his motion for a directed verdict and that the verdict was against the great weight of the evidence. In reviewing a directed verdict motion, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011).

[9] Accordingly, defendant's constitutional claims, attorney-client privilege claims, and effective assistance of counsel claims on this issue are likewise meritless.

Ordinarily, we review a great weight challenge "by deciding whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). However, because Ronald did not file a motion for a new trial based on a great weight challenge, this issue is not preserved. *Id.* An unpreserved claim is reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

B. ANALYSIS

"The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (quotation marks, citation, and footnote omitted) (emphasis in original). The intent element requires "an intent to do serious injury of an aggravated nature." *Id.* (quotation marks and citation omitted). In regard to the conspiracy charge, "[a] criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (quotation marks and citation omitted). The defendants must specifically intend to combine their actions to pursue the criminal objective, and the offense is considered complete upon the formation of the agreement. *Id.* "[B]ecause of the clandestine nature of criminal conspiracies . . . direct proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997).

In regard to bribing, intimidating, or interfering with a witness in a criminal case, MCL 750.122 provides:

> (1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:
>
> > (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
> >
> > (b) To influence any individual's testimony at a present or future official proceeding.
> >
> > (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> ***
>
> (3) A person shall not do any of the following by threat or intimidation:
>
> > (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or

> future official proceeding, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
>
> ***
>
> (6) A person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding.

Lastly, inciting or procuring one to commit perjury, MCL 750.425, requires proof that a defendant attempted to procure the perjured testimony of another, and knew that the testimony sought would be false. *People v Sesi*, 101 Mich App 256, 270; 300 NW2d 535 (1980). It is an attempt offense that requires proof of an overt act. *Id.* at 266.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found Ronald guilty beyond a reasonable doubt. As discussed above, the drug raid at Ronald's house led to the seizure of $60,000. The victim—Cornelius Owens—testified that he began to hear rumors that defendants thought he was the snitch that led to the raid. He claimed that both defendants confronted him and called him a snitch. About a week after Cornelius confronted defendants at a fish fry, Cornelius was shot twice in the leg. Both Maurice and Cornelius identified Dyterius Roby as the shooter. The expert in cellular phone analysis testified that Roby's phone was around that location, and that Roby and Steven contacted each other several times before and after the shooting. There also was evidence that Ronald subsequently deposited money into Roby's jail account.

Based on this evidence, the trial court did not err in finding that a rational jury could find Ronald guilty of assault with intent to commit great bodily harm less than murder and conspiracy to assault with intent to commit great bodily harm less than murder. While Ronald clearly prefers a different narrative and interpretation of the evidence, a directed verdict is viewed in favor of the prosecution. Moreover, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Guthrie*, 262 Mich App 416, 419; 686 NW2d 767 (2004) (quotation marks and citation omitted). This Court has repeatedly recognized that circumstantial evidence suffices as proof of the elements of an offense, and in particular an actor's intent. *Id.* In light of the foregoing, the verdicts also were not against the great weight of the evidence, as a miscarriage of justice would not result if the verdicts were to stand. *Cameron*, 291 Mich App at 617.

In regard to bribing, intimidating, and interfering with a witness in a criminal case and inciting or procuring one to commit perjury, the trial court also did not err in denying Ronald's

motion for a directed verdict. Evidence was presented that Roby shot Cornelius, and that Cornelius knew defendants were responsible. After implicating Roby, Cornelius testified that both defendants approached him and offered him money and cocaine in exchange for lying about who shot him. Ronald even accompanied Cornelius to meet with Roby's attorney, where Cornelius recanted his identification of Roby. Cornelius estimated that with the cash and cocaine, he received $4,000 from defendants. The jury also heard a taped telephone conversation between Cornelius and Steven, on which Steven was coaching Cornelius to testify in court about his confusion regarding the shooter's identity.

Therefore, viewed in the prosecution's favor, a rational trier of fact could have found that Ronald knowingly attempted to incite or procure Cornelius's perjured testimony and that he bribed, intimidated, or interfered with Cornelius in a criminal case. Also, in light of the overwhelming evidence of Ronald's guilt, the verdicts were not against the great weight of the evidence. *Cameron*, 291 Mich App at 617.

V. SENTENCING

A. STANDARD OF REVIEW

Ronald also challenges the scoring of Offense Variables (OVs) 3, 4, 13, 14, and 19.[10] As the Michigan Supreme Court recently clarified:

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

B. OV 3

OV 3 is scored at 25 points for "[l]ife threatening or permanent incapacitating injury [that] occurred to a victim." MCL 777.33(1)(c). "In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points." MCL 777.33(2)(a).

On appeal, Ronald simply posits that there was no life threatening injury or permanent incapacitating injury in this case. But, there was. Cornelius was shot twice in the leg, had to go the emergency room, needed surgery, and stayed in the hospital. Furthermore, the Presentence Investigation Report includes the following Victim's Impact Statement: "The victim stated that his balance is off, the arteries in his left leg have been replaced, and he only has a little feeling in it. The victim stated that his ability of standing for any lengthy amount of time is limited." Thus,

[10] While Ronald references OV 10 in his statement of this issue, he does not discuss OV 10 in his discussion section. Thus, he has abandoned this issue on appeal. *Payne*, 285 Mich App at 195.

the trial court did not err in scoring OV 3 at 25 points for life threatening or permanent incapacitation injury.

C. OV 4

OV 4 is scored at 10 points for "[s]erious psychological injury requiring professional treatment [that] occurred to a victim." MCL 777.34(1)(a). Moreover, "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). We also have recognized that the victim's expression of fear is enough to satisfy the statute. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009).

In this case, Cornelius's girlfriend testified that when she found him, he had been shot and "he was in shock because he just got shot and he feared for his life because he was saying help me, get me from back here." Further, the Victim's Impact Statement revealed the following:

> The victim had to relocate in order to feel safe to live a normal non-life threatening life with his wife. The victim stated that he is constantly thinking of the day that the defendant attempted to take his life by attempting to kill him. He stated that he is constantly thinking and dreaming about the incident. The victim stated that he is constantly under heavy stress due to the victim's belief of the defendant's family and associates attempting to kill him out of revenge for him testifying against the defendant. The victim stated that his balance is off, the arteries in his left leg have been replaced, and he only has a little feeling in it. The victim stated that his ability of standing for any lengthy amount of time is limited. The victim stated that he had to leave his family in order to achieve a reasonable safe disposition.

The victim details the traumatic impact this incident has on his life, which has tormented him constantly, forced him to move away, and resulted in a state of continuous fear. See, e.g., *People v Ericksen*, 288 Mich App 192, 202-203; 793 NW2d 120 (2010) (the victim suffering from depression and a personality change is sufficient evidence to justify a score of 10 points under OV 4). The trial court did not err in scoring OV 4 at 10 points.

D. OV 14

In regard to OV 14, a score of 10 points is justified when "[t]he offender was a leader in a multiple offender situation." MCL 777.44(2)(a). The statute further provides that "[t]he entire criminal transaction should be considered when scoring this variable" and "[i]f 3 or more offenders were involved, more than 1 offender may be determined to have been a leader." MCL 777.44(2); *People v Jones*, 299 Mich App 284, 286; 829 NW2d 350 (2013) judgment vacated on other grounds 494 Mich 880 (2013).

The prosecution presented evidence that there was a drug raid on Ronald's house, defendants perceived Cornelius was the snitch, and that Roby, at the defendants' direction, shot Cornelius. Ronald subsequently deposited money into Roby's prison account. While circumstantial, this evidence leads to the reasonable conclusion that Ronald, along with his brother Steven, were leaders under OV 14 as they ordered or arranged for Roby to exact their

revenge. See *Jones*, 299 Mich App at 287 (quotation marks and citation omitted) ("leader" can be understood as "one who is a guiding or directing head of a group.").

E. OV 19

In regard to OV 19, a score of 15 points is warranted when "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." MCL 777.49(1)(b).

Here, there was significant evidence that defendants engaged in a course of conduct aimed at getting Cornelius to testify falsely about who shot him. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008) (a defendant convicted of perjury may still be scored under OV 19). Further, there was evidence that Ronald employed at least the threat of force to accomplish this action. Ronald and Steven approached Cornelius about recanting his identification of Roby after the shooting. Ronald accompanied Cornelius to the offices of Roby's attorney. When asked why he agreed to this, Cornelius replied: "I was scared." After detailing how Ronald paid him in cocaine, Cornelius testified that he went along with the plan because he was scared of being shot again and scared for his family. Thus, there was sufficient evidence to score OV 19 at 15 points.

F. OV 13

A score of 25 points under OV 13 is justified when "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Moreover, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

Defendant is correct that conspiracy, MCL 750.84, is not a crime against a person, so should not have been included in scoring this variable. *People v Pearson*, 490 Mich 984; 807 NW2d 45 (2012); see also *People v Reynolds*, 495 Mich 921; 843 NW2d 168 (2014). However, Ronald's total OV score was 140 points, which is well above the Class D Grid, MCL 777.6. A reduction of 25 points does not alter his sentencing guidelines range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Bowling*, 299 Mich App 552, 563; 830 NW2d 800 (2013) (quotation marks and citation omitted). Thus, remanding for resentencing on OV 13 is not warranted.

VI. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Both defendants posit that there were repeated instances of prosecutorial misconduct that denied them a fair trial.[11] "Where issues of prosecutorial misconduct are preserved, we review

[11] Steven raises this issue in his Standard 4 brief.

them de novo to determine if the defendant was denied a fair and impartial trial." *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). This Court's review is case by case, and the prosecutor's remarks and conduct are reviewed in context. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

B. ANALYSIS

"A prosecutor may not inject unfounded and prejudicial innuendo into a trial." *Dobek*, 274 Mich App at 79. Thus, "[a] defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice*, 235 Mich App 429, 438; 597 NW2d 843 (1999). However, "[a] finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *Id.* at 76; see also *Ackerman*, 257 Mich App at 448.

Here, the evidence that the prosecutor proffered, that defendants contend rise to the level of prosecutorial misconduct, was properly admitted.[12] Therefore, defendants' "effort to frame this issue as one of prosecutorial misconduct lacks merit . . . [b]ecause the evidence at issue was relevant" and properly admitted. *Ackerman*, 257 Mich App at 448; *Rice*, 235 Mich App at 438. Essentially, defendants merely are seizing another opportunity to challenge the admitted evidence that they conclude is prejudicial. Yet, even if the trial court erred in admitting the objected to testimony, there would be no basis to find prosecutorial misconduct. "While there may be issues regarding whether this was improper other-acts evidence, we cannot conclude that the prosecutor proceeded in bad faith, given that the trial court permitted the questioning and testimony." *Dobek*, 274 Mich App at 80.

Therefore, defendants' claims of prosecutorial misconduct are meritless.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Both defendants raise several instances of alleged ineffective assistance of counsel in their respective Standard 4 briefs. In order to preserve the issue of ineffective assistance of counsel, a defendant must make a motion in the lower court for a new trial or for a hearing pursuant to *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973). *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a

[12] Furthermore, there was no prosecutorial misconduct regarding the officer's testimony that "this was the way that these people operated[.]" The court ultimately sustained an objection, although it denied a motion for a mistrial. There is no basis to conclude that this isolated comment denied defendants a fair trial, especially considering the trial court excluded this line of questioning.

violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Unger*, 278 Mich App at 242. When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). While Ronald filed a motion to remand in this Court based partly on ineffective assistance of counsel, because "[w]e have previously denied defendant's request for a remand . . . and we decline to reconsider defendant's request . . . our review of defendant's claim[s] of ineffective assistance of counsel is limited to errors apparent on the record." *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was objectively unreasonable and that the deficient performance was prejudicial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Lloyd*, 459 Mich 433, 445; 590 NW2d 738 (1999). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 US at 687. Regarding the second prong of prejudice, "defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Shively*, 230 Mich. App 626, 628; 584 NW2d 740 (1998). Accordingly, a defendant must overcome a strong presumption of effective assistance of counsel. *Unger*, 278 Mich App at 242. "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation marks and citation omitted).

B. PRETRIAL INVESTIGATION

Both defendants raise several issues regarding the pretrial performance of their respective attorneys. First, they contend that there was an insufficient investigation of potential witnesses. Steven highlights that there are other witnesses to the shooting who were not presented at trial. He claims that the failure to interview and present these potential witnesses constituted ineffective assistance of counsel.

The failure "to interview witnesses does not itself establish inadequate preparation." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). "It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.* Moreover, "the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Payne*, 285 Mich App at 190. "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted).

At trial, the lead detective testified that he interviewed other witnesses to the shooting. He verified that no helpful information was gleaned from such interviews. Thus, defendant has failed to demonstrate that these witnesses actually saw anything relevant, let alone that they were willing to testify favorable to the defense. Furthermore, the defense called another eyewitness to

the shooting who claimed that Roby was not the shooter, in an attempt to undermine the prosecution's evidence.

Moreover, "[d]efense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *Unger*, 278 Mich App at 242. Steven has not established that in declining to call these other witnesses to testify, counsel engaged in unsound trial strategy. Additionally, while Steven claims that an investigation of these witnesses would have foretold the prejudicial testimony pertaining to drugs and gang involvement, as discussed above, such evidence was properly admitted. Counsel also objected to such evidence from being admitted. Such action by counsel does not constitute objectionably unreasonable behavior. *Strickland*, 466 US at 687.

Ronald focuses on the potential testimony of Sharina Parks. He claims that Parks would have testified that Ronald knew Cornelius was not the snitch, which would have been fatal to the prosecution's theory at trial. Yet, other than his bare assertion on appeal that Parks would have testified in his favor, he has presented no evidence to substantiate this claim. Moreover, as the United States Supreme Court has recognized, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." *Strickland*, 466 US at 691. There is no indication that defendant placed trial counsel on notice that Parks could offer any relevant information or that she should be interviewed.

Therefore, defendants have failed to establish ineffective assistance of counsel on such grounds.

C. MOTION TO SEVER

Both defendants claim that their trials should have been severed, and that their respective attorneys were ineffective for failing to achieve such a result. Yet, both defendants rely on mere assertions that prejudicial evidence at trial would not have come in had their trials been severed. Neither has engaged in any meaningful analysis of the rules of severance, MCR 6.121, or of the rules regarding the admissibility of the specific evidence admitted at the trial. See *Payne*, 285 Mich App at 195 (quotation marks and citation omitted) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."). Furthermore, MCR 6.121 permits joinder of the related charges of defendants, and MCR 6.120(B)(1) defines related offenses as those based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. In the instant case, defendants' charges were related as defined in MCR 6.121 and MCR 6.120.

D. MOTION TO QUASH/BINDOVER

Steven next challenges his counsel's behavior regarding the motion to quash. Yet, counsel tried to prevent the bindover, as he filed the motion to quash. Moreover, as discussed above, there was sufficient evidence that defendants committed the charged crimes, even those on which they were bound over. Thus, any pursuit of an appeal on this issue would have been

futile. Counsel is not ineffective for failing to pursue a futile course of conduct. *Thomas*, 260 Mich App at 457.

E. RONALD'S TESTIMONY

Ronald also suggests that his counsel improperly barred him from testifying. However, at trial, the following exchange occurred:

> *[Ronald's Counsel]*. I have conferred with Ronald Owens, Jr., during the course of these proceedings. We have made a decision that he would not take the witnesses [sic] stand. Part of what the jury – the judge needs to clarify under Michigan law here is if you and I have discussed this matter, and have you made a decision as to whether or not to testify or not?
>
> *[Ronald]*. That's right.
>
> *[Ronald's Counsel]*. When you say "that's right," we have discussed that you could take the witness stand and be subjected to cross--
>
> *[Ronald]*. I choose not to t[ake] the witness stand.
>
> *[The Court]*. All right. Thank you, sir.

Thus, Ronald's arguments on appeal are directly contrary to his representations to the trial court, as he stated that he had discussed it with counsel and decided not to testify. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 632-633; 792 NW2d 344 (2010). Thus, Ronald is not entitled to relief.

VIII. MOTION TO QUASH

A. STANDARD OF REVIEW

Next, in their respective Standard 4 briefs both defendants posit that the trial court erred in denying motions to quash the information. "[A] district court magistrate's decision to bindover a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion." *People v Szabo*, __Mich App__; __NW2d__ (Docket No. 311274, issued January 23, 2014) (slip op at 2) (quotation marks and citation omitted). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes" and it "necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012). "[T]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *People v Lemons*, 299 Mich App 541, 545; 830 NW2d 794 (2013) (quotation marks, citations, and brackets omitted).

B. ANALYSIS

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it." *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011) (quotation marks and citation omitted). For the prosecution to meet its burden at the preliminary examination stage, it must present "enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt." *Id.* (quotation marks, citation, and brackets omitted). "Even if the evidence conflicts or reasonable doubt exists concerning the defendant's guilt, if the prosecutor shows probable cause that the defendant committed a felony, the district court is required to bind over the defendant and leave those issues for the trier of fact." *People v Baugh*, 243 Mich App 1, 5; 620 NW2d 653 (2000). Then, "after the preliminary examination, the district court determines the charges on which the defendant can be bound over based on the examination evidence." *Id.* at 5-6.

On appeal, both defendants focus on the conspiracy charge, arguing that there was insufficient evidence to justify the bindover.[13] Steven and Ronald were charged with conspiracy to commit first-degree murder, which is a "premeditated murder [that] requires evidence that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *Jackson*, 292 Mich App at 588 (quotation marks and citation omitted). Furthermore, "[a] criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense." *Id.* The coconspirators must specifically intend to combine their actions to pursue the criminal objective, and the offense is considered complete upon the formation of the agreement. *Id.*

At the preliminary examination, the prosecutor presented evidence regarding the February drug raid at Ronald's residence. Similar to his trial testimony, Cornelius testified at the preliminary examination regarding his run-ins with the defendants, his behavior on the Prison Talk DVD, the argument with defendants a week prior to the shooting, their accusation that he was "a snitch," and that Roby shot and chased him. Such evidence supports the trial court's finding of probable cause to believe that defendants agreed to combine actions in order to accomplish the intentional, deliberate, and premeditated murder of Cornelius. *Jackson*, 292 Mich App at 588.

[13] The extent that Steven raises the issue of perjury is as follows: "The Defendant did preserve the perjury argument in his motion to Quash and Dismiss, which was subsequently denied and is at issue. Defendant's conviction should be reversed." Additionally, while Ronald references the "assault charges," he was not bound over on assault charges. Both defendants also repeatedly conclude that they should not have been bound over on any of the charges, but offer no relevant analysis. See *Payne*, 285 Mich App at 195 (an appellant may not merely announce his position and leave it to this Court to explain and elaborate his arguments and then search for supporting authority). Further, to the extent that the defendants allude to the bindover on the other charges, their arguments are meritless.

The evidence of the conspiracy was circumstantial, and dependent on reasonable inferences. However, this Court has repeatedly recognized that "[d]irect proof of a conspiracy is not required; rather, proof may be derived from the circumstances, acts, and conduct of the parties." *Jackson*, 292 Mich App at 588 (quotation marks and citation omitted). "Inferences may be made because such evidence sheds light on the coconspirators' intentions." *Justice*, 454 Mich at 347. Defendants also raise numerous challenges to Cornelius's testimony, which essentially amount to questioning his credibility. Yet, "[t]he credibility of a witness is a question for the factfinder to resolve at trial, not for the circuit court reviewing the district court's decision." *People v Northey*, 231 Mich App 568, 577; 591 NW2d 227 (1998).

Defendants have not demonstrated that they are entitled to relief based on the denial of their motions to quash.

IX. DOUBLE JEOPARDY

A. STANDARD OF REVIEW

Also in their respective Standard 4 briefs, defendants challenge that their sentences violated the double jeopardy clauses of the state and federal constitutions.[14] Because defendants did not object on this ground below, this issue is unpreserved and our review is limited to plain error affecting substantial rights. *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007); *Carines*, 460 Mich at 763-765.

B. ANALYSIS

Const. 1963, art 1, § 15 states: "No person shall be subject for the same offense to be twice put in jeopardy." Moreover, "under both the federal and Michigan double jeopardy clauses the test is the same: in the context of multiple punishment *at a single trial*, the issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent." *People v Ford*, 262 Mich App 443, 450; 687 NW2d 119 (2004) (quotation marks and citation omitted) (emphasis in original). "Whether a defendant has received multiple punishments for the same offense is generally determined under the same-elements test, which requires the reviewing court to determine whether each provision requires proof of a fact which the other does not." *People v Franklin*, 298 Mich App 539, 546; 828 NW2d 61 (2012) (quotation marks and citation omitted).

Neither defendant engages in an analysis of the elements of the offenses. See *Kevorkian*, 248 Mich App at 389. An appellant may not "announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his

[14] Throughout Steven's Standard 4 brief, and particularly in this section, he continually refers to his trial being fundamentally unfair as it was based on inadmissible and prejudicial evidence. Not only are such conclusory arguments insufficient, *Payne* 285 Mich App at 195, but, as discussed *supra*, the evidence was properly admitted.

position." *Id.* Instead, defendants simply assert that they were charged with different crimes arising out of the same conduct. This does not constitute double jeopardy. In fact, in the context of bribing, intimidating, or interfering with a witness in a criminal case, MCL 750.122(10) specifically provides that: "This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law arising out of the same transaction as the violation of this section." Because defendants failed to present a cogent analysis of the legal framework for their double jeopardy charges, this issue is not properly before this Court.

In any event, defendants' double jeopardy arguments are meritless. Assault with intent to do great bodily harm less than murder requires an attempt to do bodily harm with the intent to do great bodily harm less than murder, *Brown*, 267 Mich App at 147, while conspiracy requires an agreement between two or more individuals to combine actions to effectuate a criminal offense, *Jackson*, 292 Mich App at 588. Thus, "each provision requires proof of a fact which the other does not." *Franklin*, 298 Mich App at 546. Furthermore, inciting or procuring one to commit perjury is an attempt offense that requires proof only that a defendant knowingly attempted to procure perjured testimony, *Sesi*, 101 Mich App at 270, which is significantly different than bribing, intimidating, or interfering with a witness in a criminal case, see MCL 750.122.

X. BRIBERY; MCL 750.122(7)(B)

A. PRESERVATION & STANDARD OF REVIEW

Defendants' next Standard 4 challenge is that their respective sentences were invalid under MCL 750.122(7)(b). To preserve a sentencing issue, a defendant must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 795; 790 NW2d 340 (2010). In this case, neither defendant raised this issue at sentencing. Thus, this issue is not preserved for appellate review. Our review is therefore limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

B. ANALYSIS

Steven has waived this issue. At sentencing, the court listed the maximum penalty for bribing and intimidating a witness as 20 years, and Steven's counsel replied: "that's correct." Arguably, Ronald waived this issue as well, as he assented to the trial court's listing of the maximum penalty and when the prosecution corrected it to a 15 year maximum, Ronald's counsel proceeded without objection.

Moreover, defendants are not entitled to the requested relief. For bribing, intimidating, or interfering with a witness in a criminal case, MCL 750.122, Steven was sentenced to 114 months to 20 years and Ronald was sentenced to 83 months to 15 years. The statute provides:

> If the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both. [MCL 750.122(7)(b).]

Defendants focus on their underlying convictions of assault with intent to commit great bodily harm less than murder—which is punishable "for not more than 10 years," MCL 750.84—to conclude that they were improperly charged under MCL 750.122(7)(b). However, defendants ignore the existence of their habitual offender status. Ronald was sentenced as a second-offense habitual offender, MCL 769.10,[15] and Steven was sentenced as third-offense habitual offender, MCL 769.11.[16] With the defendants' habitual offender status accounted for, "the maximum term of imprisonment," MCL 750.122(7)(b), for their assault with intent to commit great bodily harm less than murder convictions was more than 10 years. Neither defendant adequately addresses their habitual offender status, or cites to any authority supporting a contrary conclusion under MCL 750.122(7)(b). Thus, defendants are not entitled to relief.[17]

XI. POLICE MISCONDUCT

A. PRESERVATION & STANDARD OF REVIEW

Also in their Standard 4 briefs, defendants argue that there was police misconduct warranting reversal. Because neither defendant objected below on these grounds, our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

B. ANALYSIS

Both defendants contend that once Cornelius recanted his version of events, the police improperly questioned Cornelius and forced him to change his story. However, defendants' arguments amount to nothing more than displeasure with the fact that Cornelius changed his story. This turn of events was not the result of police misconduct. The questioning officer only interviewed Cornelius for an hour, and while he used strong language such as referencing charging Cornelius with perjury, defendants point to no authority for the conclusion that police officers must refrain from informing witnesses about the consequences of their actions.

Contrary to defendants' argument, this case did not involve an "irregularity [that] was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]" MCR 6.508(D)(3)(b)(iii).

---

[15] MCL 769.10 provides that a second-offense habitual offender status allows the trial court to increase the prison term for "not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser term."

[16] MCL 769.11 provides that a third-offense habitual offender status allows the trial court to increase the prison term for "not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term."

[17] Alternatively, the language of "the violation is committed in a criminal case" may be read as a reference to Roby's case. Because Roby was convicted of assault with intent to commit murder, MCL 750.83, which is a felony punishable by life in prison, defendants' argument fails under this reading of the statute as well.

XII. JURY INSTRUCTION

A. STANDARD OF REVIEW

Next, defendants assert that the trial court erred in instructing the jury on the lesser included offenses. "Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). Whether a jury instruction is applicable to the facts of a case is within the discretion of the trial court. *Id.* at 163.

B. ANALYSIS

Defendants argue that the jury was improperly instructed on the lesser included offense of conspiracy to assault with intent to do great bodily harm less than murder. However, defendants requested the lesser included offenses. "[A]n appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence." *People v Witherspoon*, 257 Mich App 329, 333; 670 NW2d 434 (2003).

Furthermore, defendants' arguments are meritless. Defendants rely on *People v Hamp*, 110 Mich App 92, 103; 312 NW2d 175 (1981) to support their argument. Yet, *Hamp* stands for the proposition that "conspiracy to commit first-degree murder" does not include "the lesser offense of conspiracy to commit second-degree murder." *Id.* Defendants in the instant case were not charged with nor convicted of conspiracy to commit second-degree murder. Further, *Hamp* did not stand for the proposition that conspiracy to commit first-degree murder was impervious to lesser included offenses.

Moreover, while defendants argue that conspiracy to commit first-degree murder and conspiracy to commit an assault with intent to do great bodily harm are "incompatible" because they do not require the same elements, that is the point of a lesser included offense, which often denotes a crime that has fewer elements to prove. Therefore, defendants' arguments are meritless. Further, neither defense counsel behaved objectively unreasonable based on the reasons defendants raise.

XIII. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Next, defendants assert in their Standard 4 briefs that there was insufficient evidence to convict them. "Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews "de novo a challenge on appeal to the sufficiency of the evidence." *Ericksen*, 288 Mich App at 195. "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and

the credibility of the witnesses." *Unger*, 278 Mich App at 222. However, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

B. ANALYSIS

The only cognizable claim in defendants' discussion section is a challenge to the sufficiency of the evidence relating to inciting or procuring one to commit perjury, MCL 750.425.[18] MCL 750.425 provides: "Any person who shall endeavor to incite or procure any person to commit the crime of perjury, though no perjury be committed, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years." Thus, this crime requires proof that a defendant attempted to procure perjured testimony of another, and the defendant knew the testimony sought would be false. *Sesi*, 101 Mich App at 270. It is an attempt offense and therefore requires proof of an overt act to implement the attempt. *Id.* at 266.

In the instant case, Cornelius testified that Roby shot him and that he knew defendants were responsible. However, after implicating Roby, Cornelius testified that both defendants approached him and offered him money and cocaine in exchange for lying about the identity of the shooter. Ronald even accompanied Cornelius to Roby's attorney's office, where Cornelius recanted his identification. The jury also heard a taped telephone conversation between Cornelius and Steven, on which Steven was coaching Cornelius what to say.

In light of the foregoing, there was sufficient evidence to support the jury's verdict that defendants knowingly attempted to incite or procure Cornelius's perjured testimony. MCL 750.425; *Sesi*, 101 Mich App at 270. Further, issues in Roby's case are irrelevant. Roby was tried in a separate case, with different charges, different evidence, and in front of a different jury.

XIV. PERJURY

A. PRESERVATION & STANDARD OF REVIEW

In their Standard 4 briefs defendants contend that Cornelius perjured himself at trial. Because they did not object at trial on grounds of perjury, our review is limited plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

B. ANALYSIS

"It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). "[T]he crux of the due process analysis in cases of alleged prosecutorial misconduct is whether the defendant

[18] To the extent that Ronald offers a conclusory assertion that all of his convictions were unsupported, the same reasoning for why those convictions were not against the great weight of the evidence is applicable here.

received a fair trial." *Id.* at 391. "Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998).

In the instant case, Ronald highlights the changing testimony Cornelius provided throughout the instant proceedings and those involving Roby. Thus, Ronald concludes that Cornelius committed perjury, admitted to doing so, the prosecutor knew, and the trial court acted improperly in admitting Cornelius's testimony. However, this argument overlooks that at the time of trial, Cornelius claimed to be telling the truth although he admitted to lying previously. Thus, this is not an issue of perjury, but of credibility.

"More importantly, there is no indication in the record that, even if [the witness] testified falsely, the prosecutor knew [the witness] would testify falsely." *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001). Additionally, defendants fully explored the credibility implications arising from Cornelius's changing testimony. The jury was free to disbelieve Cornelius's trial testimony. See *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005) ("This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses.").

XV. CONCLUSION

Defendants are not entitled to relief based on the admission of evidence or expert testimony, the refusal to disqualify the prosecutor's office, the denial of the directed verdict, a great weight challenge, sentencing issues, prosecutorial misconduct, ineffective assistance of counsel, the denial of the motion to quash, the double jeopardy clauses, MCL 750.122(7)(b), police misconduct, jury instructions, the sufficiency of the evidence, or perjury. Furthermore, because there are no errors, there is no cumulative effect of errors warranting reversal. *People v LeBlanc*, 465 Mich 575, 591, 591 n 12; 640 NW2d 246 (2002).

We have reviewed all other issues that defendants raise and find them to be without merit. We also find that defendants have not demonstrated a sufficient basis to justify remanding for any evidentiary hearing. We affirm in both dockets.

/s/ Jane M. Beckering
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan